QUESTION PRESENTED

1. Does the copyright in a telephone directory by the telephone company prevent access to that directory as a source of names and numbers to compile a competing directory, or does copyright protection extend only to the selection, coordination, or arrangement of those names and numbers?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1909

FEIST PUBLICATIONS, INC.,
Petitioner,

v.

RURAL TELEPHONE SERVICE COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF NATIONAL TELEPHONE COOPERATIVE ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The National Telephone Cooperative Association ("NTCA") is a trade association founded in 1954 to meet the needs and serve the common interests of rural telephone cooperatives in the United States. Today, NTCA members include small cooperatives and commercial telephone companies. These companies, like the respondent in this case, operate in sparsely populated and mostly rural areas in forty-five states. NTCA's

[1]Consent to file this brief in support of Respondent was given by both parties. Letters of consent have been separately filed with the Clerk of the Court.

members serve a total of 3.7 million subscriber lines. The member system with the smallest number of subscriber lines is The Island Telephone Company of Bangor, Maine with 72 subscriber lines. Horry Telephone Cooperative, Inc. of Conway, South Carolina, with over thirty-eight thousand subscriber lines, is NTCA's largest member. There are approximately nine hundred small telephone companies like NTCA's members operating in the United States. Together these small companies serve about 37 percent of the geographic land mass of the country but less than 5 percent of the telephone lines.[2]

NTCA's members, including Rural Telephone Service Company, Inc. ("Rural"), either publish telephone directories containing the telephone numbers of their subscribers or arrange for the publication of these directories by licensees. In a majority of cases, by company choice or regulatory requirement, the profits obtained from directory advertising are contributed to the telephone company's cost of providing telephone service to subscribers. Thus, telephone company ratepayers are generally the beneficiaries of any profits received from the telephone company's publication of the company phone book.

NTCA is interested in this case because each loss of a revenue source creates pressure for a rate increase for subscribers of small companies like its members. The survival of a small company requires maximum utilization of all of the company's tangible and intangible resources. Higher than average costs are usually incurred in providing telephone service to subscribers in the rural and sparsely populated areas served by telephone cooperatives and small telephone companies.[3] NTCA's member companies have survived precisely because they have been vigilant in conserving and investing

[2]*See*, generally, 1989 REA STATISTICAL REP., RURAL TELEPHONE BORROWERS, REA BULLETIN 300-4.

[3]*See*, FCC Access Charge Rules, 47 C.F.R. § 69.116 (1989).

available resources to provide quality service to the rural areas where they are authorized to provide service. These companies have a history of commitment to the development of "a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ." Communications Act of 1934, Ch. 652, Title I, §1, 48 STAT. 1064, 47 U.S.C. § 151 (1982). The companies have kept pace with the technological developments needed to maintain and provide high quality telecommunications services to rural America. They have brought service to areas spurned by investors seeking the more lucrative urban markets. Most of the companies have installed state-of-the-art digital switching equipment in their central offices.

As competition emerges in today's telecommunications industry, small companies must sell more than just "plain old telephone service" to survive.[4] Directory advertising sales have always been important to small telephone companies and remain so in a competitive environment. The revenues from directory advertising services benefit telephone subscribers by reducing the contribution which ratepayers must make to cover the costs of telephone service. Without the protection of copyright for their directories, the small commercial telephone companies and cooperatives would be deprived of the economic benefits accruing from the sale of white page listings. Large national and regional publishers could "milk" the local directories of vital and original information and republish that information without paying a dime of contribution to local telephone service while at the same time obtaining an unfair competitive advantage in the sale of yellow page advertising.

[4]*See*, FCC Price Caps Order, 55 Fed. Reg. 42375 (1990) (to be codified at 47 C.F.R. §§ 61, 65, and 69).

SUMMARY OF ARGUMENT

Congress intended to afford protection to telephone company directories when it adopted the Copyright Act of 1976, Pub. L. 94-553, 90 STAT. 2541-98. Copyright protection was afforded directories under decisions interpreting the prior Copyright Act and Congress indicated that the 1976 Act was not intended to overrule these decisions under the prior Act.

Telephone company generated directories contain copyrightable elements which are expressions of "original works of authorship" subject to copyright protection under the Copyright Act of 1976, 17 U.S.C. §§ 101 and 102 (1988).

Telephone company generated directories are also subject to protection under Section 103 of the Copyright Act of 1976. The directories are compilations of material contributed by the telephone companies that are the authors of the telephone numbers and the accompanying listing information which identifies the numerical codes telephone companies create to make it possible for callers to reach specific telephone stations.

The "sweat of the brow" analysis employed by the district court is consistent with judicial precedent left undisturbed by Congress in enacting Section 107 of the Copyright Act of 1976. The requirement of an "independent canvass" is an appropriate test of "fair use" and does not conflict with the congressional policy of encouraging "Science and Useful Arts."

ARGUMENT

I. TELEPHONE COMPANY DIRECTORIES CONTAIN ORIGINAL WORKS OF AUTHORSHIP WHICH MAKE THEM COPYRIGHTABLE.

Telephone company generated directories of subscriber telephone numbers are "literary works" under the Copyright Act of 1976. Sections 101 and 102 must be read and reviewed together in order to discern the intent of Congress with respect to the protection afforded these directories. Section 101 defines the term "literary work." It provides:

> "Literary works" are works, other than audiovisual works, expressed in words, *numbers*, or other verbal or *numerical symbols or indicia*, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards in which they are embodied. [Emphasis added.]

17 U.S.C. § 101.

Section 102(a) of the Copyright Act of 1976 provides:

> Copyright protection subsists in accordance with this Title [17 U.S.C. §§ 101 *et seq.*], in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> (1) literary works:

17 U.S.C. § 102.

The Legislative History of Section 102 explained that this cornerstone provision restates the two fundamental criteria of copyright protection, "originality and fixation in tangible form." H.R. REP. No. 94-1476, 94th Cong., 2d Sess., 51, *reprinted in* 1976 U.S. CODE AND CONG. & ADMIN. NEWS, 5664 states:

> The phrase "original work of authorship," which is purposely left undefined, is intended to incorporate without change the standard of originality established by the courts under the present copyright statutes. This standard does not include requirements of novelty, ingenuity, or authentic merit and there is no intention to enlarge the standard of copyright protection to require them.

Congress unquestionably intended to include directories as copyrightable "works of authorship" under Section 102. The legislative history of the 1976 Act specifically refers to "directories" and explains the congressional intent to include them in a protected category under Section 102 and in the explicit list of "literary works" covered by the definition of that term in Section 101. With respect to what is included as a "work of authorship" under Section 102, the House Report states:

> The second sentence of § 102 lists seven broad categories which the concept of "works of authorship" is said to "include." [The first of those categories is "literary works."] The use of the word "include," as defined in section 101, makes clear that the listing is "illustrative and not limitative" and that the seven categories do not necessarily exhaust the scope of "original works of authorship" that the bill is intended to protect. Rather, the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid

> or outmoded concepts of the scope of particular categories.

Id., 53.

Professor Nimmer notes that some may question whether directories are "works of authorship." Nimmer agrees, however, that such works have long been afforded copyright protection and that the Copyright Act breaks no new ground in including them under its protection. *See*, 1 M. & D. Nimmer, *Nimmer on Copyright*, Sec. 2.04 [B] (1990) ("*Nimmer*").

The legislative history explains why Congress felt it needed to define "literary works" in Section 101:

> The four items defined in section 101 are "literary works," "pictorial, graphic, and sculptural works," "motion pictures and audiovisual works", and "sound recordings." In each of these cases, definitions are needed not only because the meaning of the term itself is unsettled but also because the distinction between "work" and "material object" requires clarification.

H.R. REP No. 94-1476 at 54.

The legislative history also makes it clear that the term as used in Sections 101 and 102 did not connote "literary merit or qualitative value" as those terms are understood in ordinary usage but did include directories:

> The term "literary works" does not connote any criteria of literary merit or qualitative value: it includes catalogs, directories, and similar factual reference or instructional works and compilations of data.

Id. See also Nimmer at 2.04[B].

In its decision below, the District Court said, citing *Hutchinson Telephone Company v. Fronteer Directory Co.*, 770 F.2d 128 at 131-32 (8th Cir. 1985), "[t]he court holds that the white pages of a telephone directory constitute original work[s] of authorship and are, therefore, copyrightable under either the provision of 17 U.S.C. U 102 or 103." *Rural Telephone Service Co. v. Feist Publications, Inc.* 663 F. Supp. 214, 218 (D. Kan. 1987). *Hutchinson*, in turn, relies on the legislative history discussed there to conclude that telephone company directories are copyrightable under Section 102. The Court of Appeals for the Tenth Circuit seemingly agrees with *Hutchinson*. It affirmed the district court's opinion in this case without explanation.

NTCA respectfully submits that the courts below were correct in relying on *Hutchinson* to conclude that the white pages of a telephone directory published by the telephone company constitute an original work of authorship under Section 102.

The telephone numbers and listings in the directory published and copyrighted by the telephone company originate with and are produced by the telephone company. The listings in the white pages ordinarily consist of the complete or abbreviated names of all subscribers who agree to be listed in the directory, their telephone numbers, and all or part of their mailing addresses. The essential ingredient in each listing is the telephone number which identifies a particular telephone station. That number is not the result of any random selection process but often represents an acronym or consists of an easy to remember series of numbers. Numbers can only originate with the telephone company. Other information in the white pages simply assists in identifying the person or persons who can be located by calling a particular station number.

Telephone numbers are not just the result of clerical processes. Each published telephone number is a numerical "ex-

pression" that originates with the telephone company. Prior to the utilization of numbers, combinations of alphabets and numbers were used. These codes are produced by the telephone company to enable access to the telecommunications network over which voice and data traffic must travel to complete communications by wire or radio. The codes are published to facilitate communications. Even if state law or regulations did not require publication, telephone companies would have a strong incentive to publish the numbers so as to ensure smooth operations over their networks. The codes enable telephone equipment to properly process and carry the electrical signals which make voice and data transmission over wire and radio possible.[5] The numbers are not "preexisting facts." They are used by the caller to access customer equipment, such as telephones, facsimile terminals, and modems. They are employed by the telephone company to send signals to telecommunications switches that are either digital or mechanical processors.

These company created codes or numbers change from time to time. Recently, for example, the code or number to call back and forth between Washington, D.C. and the nearby Maryland and Virginia suburbs was changed so that the area code must now be used with the seven numbers previously used to reach stations outside the originating jurisdiction. In addition, numbers and codes have changed historically. Letters of the alphabet were once commonly used as prefixes before a station code to identify the exchange or central office where the telephone company switch directing traffic is located. These alphabetical prefixes have been replaced completely with codes that now use three digits to identify the exchange or central office serving a particular

[5]Increasingly, communications are transmitted by photons traveling in fiber optic cables.

station. Telephone numbers and the types of access codes used to access the telephone network will likely continue to change to accommodate customer growth and new technology such as developments in personal communications services ("PCS").[6] Today in the United Kingdom where PCS have already been deployed, a separate code is used to access personal portable wireless telephones operating through the use of radio waves in PCS. With new technology, it may soon be possible to reach individuals at any time in any place using a single telephone number or access code.[7]

Congress specifically provided for the protection of "literary works" expressed in numbers or "numerical symbols or indicia" in Section 101. Telephone numbers satisfy the requirement of "expression" as well as that of being "fixed" in a "tangible medium" as is required under Section 102(a). The telephone company's white pages are thus copyrightable listings of numerical "expressions" that are the codes which enable access to the telephone network. These numerical "expressions" constitute the copyrightable elements in the directory. Neither the process of assigning numbers nor the processes which manage telecommunications traffic constitute the subject matter of copyright but the published numbers which originate with the telephone company do.

Similar codes were found copyrightable under Section 4 of the Copyright Act of 1909, 34 STAT., Ch. 320 (recodified 1947, repealed 1976), the predecessor of Section 102. *See, Reiss v. National Quotation Bureau, Inc.*, 276 F. 717, 718-719 (D.C.S.D.N.Y. 1921), where Judge Learned Hand held that a blank code book which contains meaningless coined words

[6]*See*, Personal Communications Services Notice of Inquiry, 5 FCC Rcd 3995 (1990).

[7]*Id.*

prepared for use as a cable code book for cable companies contained copyrightable "writings," saying:

> A pattern or an ornamental design depicts nothing; it merely pleases the eye. If such models or paintings are "writings," I can see no reason why words should not be such because they communicate nothing. They may have their uses for all that, aesthetic or practical, and they may be the productions of high ingenuity, or even genius.

See also, Hartfield v. Peterson, 91 F.2d 998, 1000 (2d. Cir. 1937), holding that a telegraphic code book was copyrightable as a compilation under Section 6 of the Copyright Act of 1909, (the predecessor of Section 103) but concluding that original phrases and sequences could not be copied from the work when the statute allowed copyright of the compilation.

II. THE WHOLESALE COPYING OF NAMES AND NUMBERS FROM THE TELEPHONE COMPANY WHITE PAGE DIRECTORY FOR THE PURPOSE OF PRODUCING A COMPETING DIRECTORY IS NOT "FAIR USE."

Because the issue before the Court is whether the telephone company's copyright in its directory prevents access to the directory as a source of names and numbers for compiling a competing directory, it is necessary to consider whether the "fair use" doctrine permits copying for that purpose. In its analysis of this issue, the district court assumed that Rural's directory was a "compilation." It relied on *Jewelers Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir.), *cert. denied*, 259 U.S. 581 (1922) and *Central Telephone Co. of Virginia v. Johnson Publishing Co.*, 526 F. Supp. 838 (D.

Colo. 1981) to conclude that Feist's "extensive copying" was not "fair use." *Rural*, 663 F. Supp. at 219.

Jewelers holds that infringement occurs if the alleged infringer uses the copyright owner's directory as the source from which he first copies the copyright owner's entries wholesale instead of a reference against which he verifies his list. 281 F. at 92. This so-called "sweat of the brow" or "independent canvass" test in *Jewelers* was criticized by Nimmer on the ground that the cases fail to apply the standard of originality as it is understood in the law of copyright. *See Nimmer* at 3.04.

Error did not occur in this case because the district court employed the standard of originality in concluding that Rural's directory was a "work of authorship" under Section 102 as well as under Section 103. The question of "fair use" arose, as it must, after the court determined that Rural's directory was "copyrightable." The determination of "fair use" does not require a separate or different finding of "originality."

Fair use is "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent." *Harper & Row Publishers v. Nation Enterprises*, 471 U.S. 539, 549 (1985). The Copyright Act of 1976 lists the factors which shall be considered in determining fair use. They follow:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

In *Harper & Row*, this Court noted:

> The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine. [citing 3 *Nimmer* at 13.05.] Section 107 requires a case-by-case determination whether a particular use is fair, and the statute notes four nonexclusive factors to be considered. This approach was intended to restate the . . . judicial doctrine of fair use, not to change, narrow, or enlarge it in any way. [citing H.R. REP. No. 94-1476 at 66, 94th Cong., 2nd Sess. (1976).],

471 U.S. at 549.

The district court's reliance on *Jewelers* in this case did not conflict with any of the nonexclusive factors listed in Section 107. Feist's competing directory and others like it are of an obvious commercial nature. The "sweat of the brow" doctrine and the first factor listed in Section 107 takes account of the purpose and character of the rival's use of copyrighted material. Copyright owners are obviously injured by wholesale copying of their works for competing commercial purposes. The "sweat of the brow" doctrine rejects as unreasonable any such use which deprives the author of the benefits of his labor and the public of the benefits the Copyright Law is intended to provide. Feist and similar companies publish yellow page advertising for the purpose of generating revenues. *Rural*, 663 F. Supp. at 217. It is generally agreed, however, that advertising does not sell unless white page telephone listings are included in the books. Rural's copyrighted telephone directory and others like it produced by the telephone company are in a category of works specifically singled out for continued protection in the Copyright Act of 1976. The court noted that this particular case involved admissions

of extensive copying by Feist which satisfied the test that it need not make a separate finding of "substantial similarity" under *Durham Industries, Inc. v. Tony Corp.*, 630 F.2d 905, 911-12 (2d Cir. 1980). *Rural*, 663 F. Supp. at 218. Each of these factors could be properly considered to determine whether Feist could legitimately copy Rural's directory without first obtaining Rural's consent.

The "sweat of the brow" doctrine embraced by the district court does reward industriousness. The reward to the industrious "author" of a directory is, however, incidental to the privilege of "limited monopoly" which the Copyright Act is intended to give. Neither a directory nor any other work of authorship can be created without "industriousness." Every author "sweats by the brow." The doctrine merely recognizes that it is in the public interest to accord protection to the work of the author who labors first to create, select, assemble, and coordinate the data included in a catalog or directory. The doctrine is a reasonable way of protecting the original work of a directory author.

The doctrine has its genesis in English law. *See, e.g., Morris v. Wright*, 5 L.R.-Ch. 279, 286 (Ch. App. 1870), where the court announced the independent canvass rule as follows:

> [I]n a case such as this [involving a London publisher's charge of copying by a rival business directory] no one has a right to take the results of the labour and expense incurred by another for the purposes of a rival publication, and thereby save himself the expense and labour of working out and arriving at those results by some independent road. If this was not so, there would be practically no copyright in such a work as a directory.

Morris v. Wright recognizes the elemental principle that a

copyright in a directory is worthless without the "independent canvass" requirement which is basic to the "sweat of the brow" doctrine. The abolition of this requirement would discourage the "individual efforts" needed to create the multitude of directories which our society has come to rely on. The "independent canvass" requirement predates the Copyright Acts of 1909 and 1976. *See List Pub. Co. v. Keller*, 30 F. 772 (S.D.N.Y. 1887). The doctrine has been consistently applied in a long line of well-reasoned decisions. *See, e.g., Illinois Bell Telephone Co. v. Haines and Co.*, 905 F.2d 1081, 1085 (7th Cir. 1990); *Rockford Map Publishers, Inc. v. Directory Service Company of Colorado*, 768 F.2d 145, 149 (7th Cir.), *cert. denied*, 474 U.S. 1061 (1986); *Hutchinson Telephone Co. v. Fronteer Directory Co.*, 770 F.2d at 131. It is consistent with the Copyright Act of 1976 which aims specifically at providing protection to registered first expressions. The Act's purpose is to encourage "individual effort" and "advance public welfare through the talents of authors and inventors in 'Science and useful Arts'." *Mazer v. Stein*, 347 U.S. 201, 219 (1954). That purpose cannot be achieved if duly registered first expressions are allowed to be copied and sold for a profit by competing commercial enterprises that need invest no more than a copying machine to reap the rewards of authorship.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Tenth Circuit should be affirmed.

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